No. 10810

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LAWRENCE R. GREEN, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

SAMUEL O. CLARK, Jr.,
Assistant Attorney General
SEWALL KEY,
HELEN R. CARLOSS,
CARLTON FOX,
Special Assistants to the Attorney General.

INDEX

CITATIONS

628102—45

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QUESTION PRESENTED

Whether Section 3467 of the Revised Statutes imposes a tax liability upon an executor in the place of the tax liability of the estate of his decedent, which the executor has failed to pay before distributing the estate, and hence a liability for interest *qua* interest in respect thereof.

STATUTES INVOLVED

These are set out in the Argument, *infra*.

STATEMENT

While the taxpayer, Lawrence R. Green, was, with his brother Ralph J. Green, a co-equal beneficiary of the estate of his deceased father, and hence, as we argue in our brief in chief, a transferee of his estate

within the meaning of Section 900 (a) (1) of the Internal Revenue Code, the taxpayer was also the executor of his father's estate and hence liable, as such, as he asserts, to the United States under Section 3467 of the Revised Statutes.

ARGUMENT

Section 3467 of the Revised Statutes imposes no tax liability upon an executor in the place of the tax liability of the estate of his decedent, which the executor has failed to pay before distributing the estate, and hence no liability for interest qua interest in respect thereof

Since the briefs in chief in this case were written, and on January 8, 1945, the United States Circuit Court of Appeals for the Eighth Circuit has reversed the decision of the Tax Court so far as it concerns the tax liability of the taxpayer's brother, Ralph J. Green. *Nunan* v. *Green,* decided January 8, 1945. We think there is no reason why this Court should refuse to follow that decision, in so far as it holds erroneous the Tax Court's decision upon the basis on which it was rendered. For the cases of the two brothers were decided by the Tax Court upon the same basis, namely, that Section 900 (a) (1) of the Internal Revenue Code (substantially identical with Section 316 (a) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9) imposes a new liability upon a transferee for the payment of interest *qua* interest upon the transferor's tax liability subsequent to the transfer, although not before, and does not merely give the Commissioner a new remedy to enforce the transferee's liability, at law or in equity, for both the tax and interest thereon, as

well as other charges against him arising out of the transferor's tax liability.

However, the taxpayer, for the first time here, asserts (Br. 24) that, as executor of his father's will, he became personally liable for both the tax and the interest thereon, *qua* tax and interest; that is, that he became liable therefor because he was delinquent in his duties of executor, and apart from his transferee liability at law or in equity, resulting from the fact that a part of the estate had been distributed to him as beneficiary under the decedent's will. The taxpayer points out that Section 3467 of the Revised Statutes provides in this behalf that every executor who pays any debt of the estate without paying a debt to the United States from the estate "shall become answerable in his own person and estate" for the debt so due the United States. The taxpayer does not, however, appear here to rely upon the case of *Toy* v. *Commissioner,* 34 B. T. A. 877, which was decided under that section, and upon which he otherwise relies in support of his contention that he became liable for the tax and interest as a transferee. Moreover, the Tax Court cited the *Toy* case only in support of its holding that the transferee section (Section 900 (a) (1) of the Code) imposed a liability to pay interest *qua* interest upon the transferee. This is made clear when it is considered that the case was cited as authority for this also in the *Ralph J. Green* case, in which the liability of an executor under Section 3467 could not have been invoked. The same is true of the citation of the *Toy* case by the Tax Court in the other

cases in which it rendered similar decisions, namely, *Koppers Co.* v. *Commissioner,* 3 T. C. 62, and *Breyer* v. *Commissioner,* decided January 20, 1944, both pending on appeal in the Circuit Court of Appeals for the Third Circuit, and *Henderson* v. *Commissioner,* decided December 14, 1943, pending on appeal in the Circuit Court of Appeals for the Fifth Circuit.

Since the taxpayer's buttressing contention, based on Section 3467, was not made in or considered by the Tax Court, it was not necessary for the Government to do more in its opening brief than to distinguish the *Toy* case. This we did (Br. 13–14) on the ground that, unlike Section 900 (a) (1) of the Internal Revenue Code, Section 3467 made an executor personally liable for the tax—plus interest thereon, of course. But as we also there pointed out, the correctness of the decision in the *Toy* case was, in our opinion, open to doubt, as, indeed, Judge Turner had already stated in his dissenting opinion. (R. 36–37.) Moreover, it is questionable whether the issue based on Section 3467 can be raised in this proceeding, since here, but unlike the *Toy* case, the Commissioner did not proceed against the taxpayer thereunder. (R. 21.) The liability of a fiduciary hereunder is different from the liability of a transferee. Under Section 3467 it extends to the value of the entire estate, whereas a transferee's liability is limited to the value of the property he has received. Also the defenses may be different. Cf. *Moore* v. *Commissioner* (C. C. A. 2d), decided January 18, 1945.

In any event, the decision in the *Toy* case is wrong, for, as Judge Turner said, the fiduciary's liability

under Section 3467 is "in the nature of a penalty for the wrongful act of a fiduciary in making distribution of a trust estate before satisfying the liability of the estate to the Government for tax and interest." And, as Judge Turner further said (R. 37), such tax and interest are merely the measure of the penalty imposed and not "[as to] the fiduciary tax and interest."

The taxpayer's additional contention here brings two further provisions of the law into consideration in addition to those set out in the Government's main brief. The first is Sections 3466 and 3467 of the Revised Statutes, the latter already adverted to, which are as follows:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding; concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C. 1940 ed., Sec. 191.)
>
> SEC. 3467. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in

his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (31 U. S. C. 1940 ed., Sec. 192.)

The second is Section 900 (a) (2) of the Internal Revenue Code, identical with Section 316 of the Revenue Act of 1926, which reads as follows:

SEC. 900. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

* * * * *

(2) *Fiduciaries.*—The liability of a fiduciary under section 3467 of the Revised Statutes (U. S. C., Title 31, § 192) in respect of the payment of any such tax from the estate of the decedent.

* * * * *

(26 U. S. C. 1940 ed., Sec. 900.)

First as regards Sections 3466 and 3467 of the Revised Statutes. Both of these sections, and not alone Section 3467, are here involved, for they are to be read in *pari materia*. *United States* v. *Butterworth Corp.*, 269 U. S. 504, 513; *Bramwell* v. *U. S. Fidelity*

Co., 269 U. S. 483, where the Court in this behalf said (p. 490):

> The persons held are "every executor, administrator, or assignee, or *other person.*" The generality of the language is significant. Taken together, these sections mean that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, as the rights and priorities of creditors may be made to appear.

Thus, while, as we shall endeavor to show, Section 3466 was designed to give a debt owing the United States a priority where the property of an insolvent debtor was in the hands of an assignee or other fiduciary, Section 3467 was designed to impose a personal liability upon such fiduciary, to insure the Government such priority, in the event he disposed of the debtor's property without having first discharged such debt.

As stated, Section 3466 which derives from Section 5 of the Act of March 3, 1797, c. 20, 1 Stat. 512, 515, creates only a right in the United States to priority for the payment of a debt due it. *United States* v. *Oklahoma,* 261 U. S. 253; *United States* v. *Fisher,* 2 Cranch 358; *In re C. J. Rowe & Bros.,* 18 F. 2d 658 (W. D. Pa.); *United States* v. *Emory,* 314 U. S. 423, 426; *United States* v. *Texas,* 314 U. S. 480, 483, *et seq.* Hence, it accomplishes no more than to make the debt due the United States by a decedent's estate for taxes a privileged debt. G. C. M. 824, V–2 Cum. Bull.

54 (1926). It does not convert the fiduciary into an original debtor, nor make the debt that of the fiduciary. The latter is liable only for his failure duly to regard the rights of the United States to have a debt due it by the decedent or his estate accorded priority as and when required by the section. Accordingly, under Section 3466 the fiduciary who becomes vested with title to the debtor's property is thereby made trustee for the United States and is bound to pay the debt first out of the proceeds of the debtor's property. *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 133; *United States* v. *Oklahoma, supra,* p. 260; *Bramwell* v. *U. S. Fidelity Co., supra,* p. 488; *United States* v. *Clark,* 25 Fed. Cas. No. 14,807. The case thus presented is that of a trust fund—a trustee holding and a *cestui qui trust* claiming it—and the same remedies are applicable as if the fund had arisen and the trustee had been appointed in any other way. *Lewis* v. *United States,* 92 U. S. 618, 622, citing *inter alia, Beaston* v. *Farmers' Bank, supra,* and *Thelusson* v. *Smith,* 2 Wheat. 396, 425. While undoubtedly the liability may be enforced against the delinquent fiduciary in equity, it is also enforceable against him at law. The action at law by which it is to be enforced is assumpsit for money had and received, founded upon a breach of duty of the fiduciary. *United States* v. *Dewey,* 39 Fed. 251 (S. D. N. Y.).*

*Apparently Congress thought the action sounded in tort, for so it explained in providing for the enforcement of the right by the administrative procedure provided by Section 900 (a) (2) of the Internal Revenue Code above set out and hereinafter discussed, under which the amount of the deficiency determined

In any case, it is not an action for debt upon a tax vicariously owed by the fiduciary, together with interest *qua* interest. Moreover, the fiduciary's liability is limited by the nature of the assets that came into his hands. *United States* v. *Barnes,* 31 Fed. 705, 707 (S. D. N. Y.).

While, as stated, Section 3466 derives from the Act of March 3, 1797, it was the Act of March 2, 1799, c. 22, 1 Stat. 627, Section 65, which first introduced the provisions of Section 3467, specifically making every executor, administrator, assignee or other person answerable for failure to pay the United States. But the revision did not involve any substantial change of phraseology and did not work any change in the purpose or meaning of the priority act. *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 213; *Price* v. *United States,* 269 U. S. 492, 501. And, as the Court further said in the *Price* case (p. 501), there is no reason for any distinction in respect of priority between taxes and other amounts owing to the United States. In other words, so far as concerns Sections 3466 and 3467, taxes due the United States are regarded as an ordinary debt which is no different from any other debt. Thus, no one would contend that if the debt due the United States by the decedent or his estate was on a contract, the executor would by virtue of these sections be substituted for him or it as a party thereto. Similarly, it can not be said that the ex-

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against the decedent or his estate—tax and interest—is the measure of that right. See H. Conference Rep. No. 356, 69th Cong., 1st Sess., pp. 44–45 (1939–1 Cum. Bull. (Part 2) 361, 372).

ecutor is substituted under the section as the taxpayer in the place of him who owns the tax and the interest thereon. There is nothing in the decisions of the Supreme Court or of those of the lower federal courts which justifies a contrary conclusion. In fact, the only case holding to the contrary is the *Toy* case. But that case rests upon the obviously erroneous assimilation by the Tax Court of an executor's liability under Section 3467 to the liability of one who receives property and assumes the burden of paying the mortgage thereon.

Turning then to Section 900 (a) (2) of the Internal Revenue Code (same as Section 316 (a) (2)), it is also well settled that the summary method thereby provided for the enforcement of the fiduciary's liability to the United States under Section 3467 did not create a new obligation. *United States* v. *First Huntington Nat. Bank,* 34 F. Supp. 578, 581 (S. D. W. Va.), affirmed *per curiam,* 117 F. 2d 376 (C. C. A. 4th). In support of this view, the District Court cited not only *Phillips* v. *Commissioner,* 283 U. S. 589, which is cited in the Government's main brief (p. 11) to that effect, but two decisions of this Court, namely, *Leighton* v. *United States,* 61 F. 2d 530, and *Rosenberg* v. *McLaughlin,* 66 F. 2d 271, certiorari denied *sub nom. Rosenberg* v. *Lewis,* 290 U. S. 696.

We therefore submit that the recovery on the liability imposed by Section 3467, whether enforced at law or in equity or under the provisions of Section 900 (a) (2) of the Internal Revenue Code, is limited to the value of the estate which came into the fidu-

ciary's hands. It is also for this reason that, before a recovery can be had, under Section 3467, the United States must allege and prove the insufficiency of the assets of the estate to pay the decedent's debt to the United States. *United States* v. *Giger,* 26 F. Supp. 624 (W. D. Ark.). This is precisely the same proof that must be made to establish a transferee's liability at law or in equity. See *Phillips* v. *Commissioner, supra,* pp. 604–605.

So far we have sought to show that Section 3467 imposes no more than a liability in equity under the trust fund doctrine, or at law for money had and received, from which it necessarily follows that such liability is merely measured by the tax and interest owing by the decedent or his estate. So that whatever may be collected from the fiduciary by way of interest is collected as a part of such liability and not *qua* interest. A number of the decisions of the Board of Tax Appeals support this view. *Bettendorf* v. *Commissioner,* 3 B. T. A. 378; *Lang* v. *Commissioner,* 45 B. T. A. 256. The attempt of the Tax Court to distinguish the *Toy* case from the *Bettendorf* case on the ground that the deductibility of the disputed interest payments in the latter rested solely on the petitioner's status as a distributee or transferee, whereas its deductibility in the former rested solely upon the petitioner's liability under Section 3467, manifestly merely assumes the point in issue.

CONCLUSION

It is therefore respectfully submitted that Section 3467 does not, any more than does Section 900 (a) (2)

of the Internal Revenue Code, impose either a tax liability as such upon the fiduciary or a liability to pay interest *qua* interest thereon. And, since, as we contend in our opening brief, no such liability is imposed upon the taxpayer as a transferee under Section 900 (a) (1) of the Internal Revenue Code, the decision of the Tax Court should be reversed.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
CARLTON FOX,
Special Assistants to the Attorney General.

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